

July 1-58

MEMORANDUM FOR THE RECORD

SUBJECT: Construction of Reference Statutes

1. Horack's Sutherland Statutory Construction states in Section 5208:

"A statute of specific reference incorporates the provisions referred to from the statute as of the time of adoption without subsequent amendments, unless the legislature has expressly or by strong implication shown its indication to incorporate subsequent amendments with the statute. In the absence of such intention subsequent amendment of the referred statute will have no effect on the reference statute. Similarly, repeal of the statute referred to will have no effect on the reference statute unless the reference statute is repealed by implication with the referred statute."

2. The first U. S. Supreme Court ruling on this subject is found in Kendall v. U. S. (12 Pet. 37 U.S. 524) wherein Justice Thompson, for a unanimous court, states:

"It was not an uncommon course of legislation in the States at an early day to adopt by reference, British statutes; and this has been the course of legislation by Congress in many instances where State practice and State process has been adopted. And such adoption has always been considered as referring to the law existing at the time of adoption; and no subsequent legislation has ever been supposed to affect it. And such must necessarily be the effect and operation of such adoption. No other rule would furnish any certainty as to what was the law, and would be adopting prospectively, all changes that might be made in the law".

The ruling of Kendall v. U. S. has been followed by the Supreme Court in 144 US 94 (36 LE 359), In re Thomas W. Heath, 264 US 392 (68 LE 755), Panama Railroad Company v. Andrew Johnson, 271 US 38 (70 LE 817), Engel v. Davenport, by the Federal courts in 83 Fed. (2d) 180 and 83 Fed. (2d) 267; and by numerous State appellate courts.

3. In the case of in re Thomas W. Heath (144 US 94) Chief Justice Fuller, for the court states:

"Prior acts may be incorporated in a subsequent one in terms or by relation, and when this is done, the repeal of the former leaves the latter in force, unless also repealed expressly or by necessary implication. And the adoption in a local law of the provisions of a general law does not carry with it the adoption of changes afterwards made in the general law."

4. A contemporary authority, Judge Augustus N. Hand, speaking for the court in U. S. ex rel Kessler et al v. Mercur Corporation et al (83 Fed. (2d) 178) states;

"Revised Statutes, § 5438, which was incorporated by reference, in section 3490, provides, among other things, as follows: 'Every person who makes \*\*\* or presents \*\*\* any claim upon or against the Government \*\*\* knowing such claim to be false \*\*\* or who, for the purpose of obtaining \*\*\* the payment or approval of such claim, makes \*\*\* any false \*\*\* account \*\*\* knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government \*\*\* by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim,' shall be subjected to a specified fine or imprisonment.

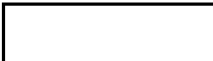
"While section 5438 was amended, repealed, and finally since the time when it was referred to in section 3490 superseded by a broader enactment (18 U.S.C.A. §80), it stands, so far as section 3490 is concerned, as it was written when incorporated by reference. It is quite immaterial that the superseding act alone appears in the United States Code, for the Code only embodies a prima facie statement of the statutory law. It is well settled that where a statute incorporates another, and the one incorporated is thereafter amended or repealed, the scope of the incorporating statute remains intact and "no subsequent legislation has ever been supposed to affect it."

5. No cases holding to the contrary have been found.



Office of General Counsel

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